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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1941

No. 300 - 301

WILBUR L. HUNT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

GLENN HENDERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY L. BALLARD,
Counsel for Petitioners.

LOUIS KOTTER,
Of Counsel.

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Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Wilbur L. Hunt and Glenn Henderson, joint petitioners herein, pursuant to Rule 48 of the Revised Rules of the Supreme Court of the United States, adopted Feb. 13, 1939, respectfully pray that a Writ of Certiorari issue to review judgments of the Circuit Court of Appeals

for the Seventh Circuit, entered in the above cause on May 21, 1941 affirming the judgment of the District Court for the Northern District of Illinois.[1]

Opinion Below.

The opinion of the Circuit Court of Appeals appears in the record on pages 269 to 271.

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on May 21, 1941 (R. 272). Petitioners filed a joint petition for rehearing which was denied on June 23, 1941 (R. 298). The jurisdiction of this Court is invoked under Section 347 (a) Title 28 United States Code.

Questions Presented.

1. Whether the evidence is so utterly insufficient as to require a reversal of the judgment against each defendant.

2. Where the evidence does not apply to all the Counts but only to some creating confusion in the jury's mind, and said confusion prejudicing the defendants; whether the defendants can be denied the privilege of having the Government in such case make an election.

3. Whether each defendant is denied under the Fifth Amendment to the Constitution, due process of law and a fair and impartial trial, and deprived of the benefit of the presumption of innocence by the Trial Judge in (a) limiting the right of cross-examination which was directed to the credibility of certain Government witnesses, (b) failing to give requested instructions, (c) giving an improper

[1] The instant case is a retrial. A previous trial was reversed by confession of error by the Government.

instruction as to "debauchery", (d) permitting improper re-direct examination, (e) introduction of rebuttal evidence anticipatory of the defense, and (f) admission of improper testimony relative to statements made by each defendant out of the presence of the other, (g) admitting statements tantamount to involuntary confessions into evidence.

4. Whether the prosecuting attorney's misconduct, permitted by the Trial Judge, was such a gross violation of proper trial procedure as to have deprived each defendant of a fair and impartial trial.

5. Whether the indictment which is vague, indefinite and uncertain did not inform defendants of the charge, and resulted in prejudicial variance between the indictment and the proof.

6. Whether the trial court did not abuse its discretion in denying defendants' individual, uncontradicted and undenied sworn affidavits in support of petitions for severance which alleged, that (1) the major portion of the evidence of the previous trial revolved around acts and conversations of one defendant out of the presence of the other, all of which were prejudicial, and if offered again in the current trial would prejudice the latter, that (2) the indictment is joint and several and evidence pertaining to one defendant would be prejudicial to the other, (3) that the alleged statement of Hunt to Agent Mullen, "I am in it just as deep as Henderson", would unduly prejudice Henderson and deprive him of a fair and impartial trial.

Statute Involved.

1. Section 398, Title 18, U. S. C. A., appears in the appendix, p. 43.

STATEMENT OF THE CASE.

The petitioners were convicted on all six counts of the indictment (R. 3-5) of transporting two girls, Juanita Marquis and Viona Barker, from Benton Harbor, Michigan, to Chicago, Illinois, for the purpose of prostitution, debauchery and other immoral practices, and of transporting the same girls from Chicago, Illinois, to Milwaukee, Wisconsin, for the purpose of prostitution, debauchery, and other immoral practices. (Sec. 398, Title 18, U. S. C. A.).

The Government's case centered around the testimony of the two Government witnesses, who were alleged to be the girls involved in the offense charged against the petitioners, Wilbur Hunt and Glenn Henderson. The first of these was Viona Barker. She worked as a prostitute before leaving high school when she was about 15 or 16 years of age. She did not remember if she had any occupation from September, 1937, until August, 1939 (R. 37).

Juanita Marquis, the other chief Government witness, first worked as a prostitute in Nashville, Tennessee, when she was 17 years old (R. 63). She left Nashville for Detroit, Michigan (R. 49); from there she went to Benton Harbor, Michigan, married at South Bend, Indiana, a person, whom she met either in Nashville, Tennessee (R. 49), or Benton Harbor, Michigan (R. 64).

In Benton Harbor, Juanita was a waitress, but she also worked as a prostitute though married (R. 64). Her husband left her, and in August, 1939, Juanita was living at a boarding house, owned by Mrs. Sheffield, the mother of Wilbur Hunt a defendant (R. 49).

Juanita met Hunt for the first time at his mother's rooming house some time in July, 1939, and the next occasion was in August, 1939, after Viona had arrived on a Thursday morning; in the afternoon, the girls went to South Bend (R. 48), being driven there by a man, whom Juanita knew just casually. She did not exactly hitchhike (R. 67).

On Friday, Juanita and Viona met petitioner Hunt, at which time Viona was introduced to him. There was no conversation at the time of this introduction (R. 24, 49). Viona testified the girls saw Hunt Friday night at a tavern where a conversation "just concerning personal affairs" (R. 25), took place; Juanita could not remember any conversation (R. 49).

Viona testified that she told Juanita she wanted to go to Chicago (R. 39). Later, she testified that she told Juanita she would *like* to go to Chicago (R. 39). She further testified that they talked of Chicago all their lives, the first time when she was so small that she didn't even remember (R. 39). However, on cross-examination, Viona stated that she told Henderson she had worked in Chicago as a waitress in 1937 (R. 45).

Viona testified, over objection, that Juanita asked Hunt if he could find a place for them to stay (R. 25); Juanita testified to the contrary that she did not ask him to find a place for her (R. 50).

These girl Government witnesses testified that they met Henderson Saturday night, recalling specific conversation (R. 50), but Hunt and Henderson went outside for about fifteen minutes when Henderson said something was wrong with his car (R. 50). Then, Juanita testified that they were asked if they wanted to go to a beach amusement park at St. Joe, Michigan. That is all that Juanita could remember being said at the time (R. 51). They were at the

amusement park for an hour and a half (R. 42), returning to Benton Harbor and going to Hunt's mother's rooming house (R. 42).

Viona testified that after they got their bags Henderson, Juanita, and she made the trip to Chicago in Henderson's car (R. 27). Hunt did not go with them. Juanita testified that Henderson helped put their suitcases in the car, but she didn't remember "if Bud Hunt helped us put anything in the car" (R. 51). Upon cross-examination, she further stated that "it is possible I am mistaken that he (Hunt) put the suitcases in the car" (R. 68).

While Henderson drove the girls to Chicago, they fell asleep and awakened in Chicago. The girls registered at the Stately Hotel under the name of Gail Tyler and sister; Henderson did not suggest that name (R. 28). Henderson went on to his hotel. Hunt did not drive to Chicago with them. He met them the next day in Chicago. The ride from Benton Harbor to Chicago by car is about 2 hours.

A trip was made on Tuesday from Chicago to Aurora in Henderson's automobile (R. 31). Juanita testified that she walked to the door of a hotel with Viona who went in and then she went back and had a glass of beer in a tavern, after which the three returned to Chicago without Viona (R. 53).

That night Juanita went out to eat with Hunt, and a conversation took place about going to Milwaukee. Before United States Commissioner Walker, at the preliminary hearing, Juanita testified that she asked Hunt if she could drive his car into Milwaukee (R. 70).

On Tuesday, Juanita saw Hunt, who, she testified, told her that they were going to Milwaukee in Henderson's car (R. 71). Before Commissioner Walker, Juanita previously testified that she drove a car herself to Milwaukee

(R. 71). They arrived in Milwaukee, and after a while went to the Linn Tavern, where Juanita went in alone (R. 71). Although Juanita stated before Commissioner Walker that there was no conversation at all about the work she was to do before going in to the Linn Tavern, on the trial she stated that there was a conversation that she would be treated nice (R. 71).

The Circuit Court of Appeals, in its opinion, stated: "Upon defendants' request the girls paid their earnings to them" (R. 270).

The petitioners state that the Circuit Court of Appeals misapprehended the facts in the case. Juanita Marquis testified that the petitioners did not say she was to give them money (R. 55). She further testified (R. 71): "Mr. Hunt did not at any time ask me for any money. I did not give him any money." Nowhere in the record is there any evidence that Wilbur Hunt received or requested any money from either girl.

It is admitted that moneys were paid to the defendant Henderson and the Circuit Court of Appeals erroneously assumes and infers that this money was part of the girls' earnings paid to him as such. It was overwhelmingly established on the trial that the moneys received by the defendant Henderson were for garments sold by him to these girls. When it is realized, as it should be, that the money was in payment for the said garments, then the true construction can be given to all the incidents surrounding the payment of the money, and then it is firmly believed, this honorable Court will readily recognize the error made by the Circuit Court of Appeals.

Reference is made to the testimony of Edwin K. Walker, United States Commissioner (R. 102), as follows:

> "My recollection of that testimony is that she said she did pay Henderson $16.00 or $16.50 to apply on

account for pajamas; they had been procured for her by Henderson. To my recollection, it was $16.50, on account of some pajama transaction."

And further (R. 103):

"I recall Viona Barker testified that she would pay no more than some sum she had paid because she claimed he was overcharging her * * *"

It was affirmatively proved that the garments were purchased from the defendant Henderson. (R. 76, 87-88, 103, 110, 112-113, 115-117, 120-121, 125-126, 131.) It is to be observed that the business of the defendant Henderson was selling garments, particularly to people in this type of business. There is ample reason (or as the Circuit Court of Appeals describes it "*plausibility*") for the defendant Henderson's actions, requests and money demands from these girls (R. 270). The Circuit Court of Appeals seemingly overlooks the efforts made by the petitioners to assist the girls in leaving Chicago. Their acts in this regard defy the theory that they were interested in the earnings of the girls. We urge, for this honorable Court's consideration, recognition of the fact that the total money received by Henderson was less than the retail price of all of the garments sold by him to the girls and that altogether Henderson was not paid in full for the merchandise (R. 116).

Viona stated that she worked as a prostitute in Aurora (R. 32). Juanita stated that she engaged in prostitution at the Linn Tavern (R. 55).

Neither Viona nor Juanita saw Hunt again at any time until he was seen in the police station in Chicago (R. 32, 61), approximately one month having intervened. Hunt for this whole period was not in the picture. Henderson was busy selling garments to others as well as these girls.

Viona testified that three or four days after arriving in Aurora Henderson brought a pair of pajamas to her, and she gave him quite a bit of money with instructions to send it to her mother. A week later at the girl's request Henderson agreed to drive them to Chicago and put them on the train for Nashville (R. 33). There is a tale of a confusing incident of stopping at some tavern, where Viona was introduced to some fellow, of becoming sick, and returning to Chicago with this man, breaking away from this man in Chicago, and then calling the police (R. 34-35, 47, 59-60). All of this testimony over which neither defendant had control concerning acts of third persons of a reprehensible nature was allowed into evidence over vigorous objection (R. 34, 35, 36).

Juanita's testimony indicates she saw Henderson in Milwaukee, a week after arriving at the Linn Tavern. There was a conversation to the effect that Hunt was mad at her. They went to Sheboygan, Wisconsin, and a week later to Manitowoc, Wisconsin, back to Sheboygan, and then to Chicago (R. 57). Juanita saw Viona in Aurora about a week later, and after a few days returned to Chicago as above described (R. 59). All conversations outside of Hunt's presence concerning incidents over which he had no control nor any remote connection, were admitted into evidence over his objection. The Trial Court's suspension of the rules of evidence removed the last vestige of due process.

The Government also used two other witnesses, Mabel Wright and Mildred Butler. This presumably was to corroborate the stories of the girls. These two were the owners of houses where the girls "worked."

It is well to note that Circuit Court of Appeals in its opinion (R. 270) stated:

> "Owners of the houses testified the defendants conferred with them regarding the placement of the girls."

It seems hardly adequate to say this is an incorrect statement of the fact. Actually, the evidence shows that there was no such testimony by the owners of the houses. Such a distortion clearly shows the lack of knowledge or misinformation of the Circuit Court of Appeals concerning the facts in the record. For example, on page 85 of the record, during the testimony of Mildred Butler, a Government witness, is the following:

> "Mr. Gerber: With reference to the time you met Juanita Marquis, will you tell us whether or not you knew Jack Harding or Bud Hunt at that time?
>
> Mr. Kutner: I object to the form of the question.
>
> The Court: Overruled.
>
> (Exception taken by defendants.)
>
> The Witness: A. I knew them at that time.
>
> Mr. Gerber: Q. Had you seen either of them shortly before that time or shortly after that time?
>
> Mr. Kutner: I object to the form of that question.
>
> The Court: Overruled.
>
> (Exception taken by defendants.)
>
> The Witness: A. I saw them shortly *after* that time, but not *before.* I had not seen them . . ." (Italics ours.)

On page 86 of the record, Mildred Butler further testified:

> ". . . Juanita Marquis had been there and gone before I saw Henderson and Hunt again. I *did not have any conversation with these men concerning Juanita Marquis.* It had been probably a month or a month and a half before Juanita Marquis came to my place since I had last seen either Hunt or Henderson." (Italics ours.)

As owner of the house in Aurora, Mabel Wright testified that she had not met Hunt at any time before she met Viona Barker (R. 89). And as to Juanita Marquis, she testified:

> *"I recall testifying in this case about a year ago in this courtroom. At that time I testified that Henderson did not bring the girl out but that she came up there and looked for the job herself. That Juanita was the one that asked for the job."* (Italics ours.)

Another witness of the Government was Thomas F. Mullen, a special agent for the Federal Bureau of Investigation. Mullen testified as to conversations with the petitioners and the girls after the petitioners were taken into custody; that he told Hunt that the girls had made complete statements to him, that he asked Hunt if he cared to make or give a signed statement, to which Hunt replied, "No, I am in just as deep as Henderson." (R. 90-95) Counsel for petitioners objected to such testimony on the ground that no legal and proper foundation had been laid and that such statements of Hunt were involuntary (R. 95). The objection was overruled and exception taken. Certainly Henderson was irreparably prejudiced by such a statement being made outside his presence and being in no position to deny it. The value of Mullen's testimony becomes questionable after he admitted that in the previous trial he did not testify about Hunt telling him about any trip from Chicago to Aurora, and from Aurora to Milwaukee. The reason given for this obvious inconsistency by Mullen, is that "during the past year I have had occasion to refresh my recollection and I refreshed it." (R. 95)

Another Government witness was Joseph E. Tobin, Chief Deputy United States Marshal. It is also upon this testimony that petitioners contend fatal and reversible

error was made. Counsel for petitioners objected to this testimony as being improper, premature, and prejudicial (R. 80). The objection was overruled and exception taken.

Tobin testified that he was in the hearing room of Commissioner Walker on September 16, 1939; that he saw Hunt and Henderson there; that he listened to the hearing; he observed Hunt who had one finger in front of his mouth and was shaking his head from side to side (R. 80). Cross-examination of Tobin disclosed his utter confusion as to what transpired at the hearing before Judge Walker (R. 81).

Minnie Kelly, Clerk for Commissioner Walker, testified that she was present at the hearing, and that she saw Hunt put his finger to his mouth and shake his head negatively. Petitioners contend that this rebuttal evidence introduced during the Government's case-in-chief, is erroneous, due to its anticipatory nature.

The flagrant contradictions in the testimony of the Government witnesses is irreconcilable; it is apparent the Government overreached itself in its zeal to make a case! On the testimony of the two girls, Juanita and Viona, the charge of perjury could easily be sustained were they not protected by the Government. Mullen's naive attempt to tie the very loose ends of the evidence together, due to his manifest partisanship and lack of ingenuity detracts mightily from the value of his testimony.

The proof by the Government attempted to show that two confessed prostitutes, with a long experience in prostitution before meeting petitioners, sought transportation to Chicago. One of the two girls had "worked" in Chicago. The girls knowingly resorted to their feminine guile to beguile petitioners. Hunt knew Henderson was driving to Chicago. Henderson's role was solely that of an accommodating chauffeur. Hunt's participation was

devoid of criminal intent and partisanship as is borne out by the record. Henderson first learned of the girls' true profession in Illinois.

The testimony of Juanita before Commissioner Walker clearly exonerated both petitioners. The Commissioner's testimony cannot be successfully overcome. Juanita subsequently told a different story to lend consistency to the Government's case.

The testimony of the two owners of the houses of prostitution proved beyond all question that neither petitioner, alone or together, were responsible for the placement of the two girls.

Justice has certainly been cruelly mocked. Two dissolute girls who polluted their bodies, even while married, were permitted to come in so sacred a place as a United States Court to make merchandise of their oath. Nevertheless, a trial by prejudice resulted in a verdict of guilty and each petitioner was sentenced to confinement in the penitentiary for five years (R. 227).

No inference of guilt can possibly be drawn from transporting two women across a state line unless the intent and purpose required under the statute has been proved. The evidence shows that the girls themselves sought to be driven to Chicago and found the jobs for themselves. Petitioners contend the necessary intent has not been proved.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming a judgment based on insufficient evidence, resulting from the cumulative errors which so permeated the record that the petitioners were deprived of a fair and impartial trial.

2. In holding that the acts and conduct of the trial judge such as limitation of cross-examination and the refusal to give proper requested instructions, did not deprive the petitioners of the presumption of innocence and prejudice the right to a fair and impartial constitutional trial.

3. In affirming a judgment, brought about by prejudicial misconduct of the prosecuting attorney.

4. In holding that the indictment sufficiently apprised the petitioners of the charge against them, and that the variance between the indictment and proof was not prejudicial.

5. In holding that refusal of severance was not prejudicial.

REASONS FOR GRANTING WRIT.

I.

The evidence is utterly insufficient and requires a reversal of the cause.

The petitioners respectfully urge that the evidence does not prove, beyond a reasonable doubt, that they violated the statutory offenses charged by the indictment. The statute, allegedly violated here, makes the inducing, enticing, or compelling of the women to go from one state to another to engage in prostitution, to give themselves up to debauchery, or to engage in other immoral practices, a necessary part of the offense. *Welsch* v. *United States,* 220 Fed. 764.

The mere fact that a journey has been made between two states does not justify the conclusion that the petitioners persuaded and induced the women to make such journey. It is necessary to show that, except for the accused's express desire and inducement, the women who were transported would not have made the journey. *Welsch* v. *United States,* 220 Fed. 764; *Thorn* v. *United States,* 278 Fed. 932; *Williams* v. *United States,* 282 Fed. 481, and *United States* v. *Grace,* 73 Fed. 2nd 294.

The evidence in this case fails to show any enticement or inducement on the part of petitioners. The record discloses that Viona told Juanita that she wanted to go to Chicago, Juanita asked petitioner Hunt to find a place for Viona and told him she and Viona wanted to leave Benton Harbor and go to Chicago to work (R. 39, 102, 104). So much for the journey from Benton Harbor to Chicago.

As to the journey to Sheboygan, Wisconsin,[1] the evidence shows that Juanita Marquis testified at the preliminary hearing before Commissioner Walker that this trip was her own idea (R. 104), and that she told one of the petitioners that she wanted to go to Sheboygan (R. 104). It is impossible, in the light of such evidence, to find any inducing, enticing or compelling on the part of the petitioners. In fact, the lack of it is most obvious.

In addition to the requisites of inducing, enticing, or compelling, the statute requires the intent to transport women from one state to another for immoral purposes be formed *before* the actual crossing of the state line. No matter how many immoral acts may have been committed after the state line was crossed, if the intent to commit such acts did not exist before the actual crossing of the state line, there is no violation of the statute. *Sloan* v. *United States,* 287 Fed. 91; *Van Pelt* v. *United States,* 240 Fed. 346; *Fisher* v. *United States,* 266 Fed. 667; *Shama* v. *United States,* 94 Fed. 2nd 1; *Biggerstaff* v. *United States,* 260 Fed. 926; *Neff* v. *United States,* 105 Fed. 2nd 688. (Italics ours.)

The evidence shows no proof beyond a reasonable doubt that the petitioners had formed the necessary statutory intent before the state line was crossed. It is evident (from Juanita's previous testimony as stated by Commissioner Walker) that the petitioners did not promise to find her any work and had not talked about what sort of work she would do after the journey was completed (R. 104).

The fact that the women transported worked in houses of prostitution after the journey was completed does not warrant conviction under the act. Especially is this so

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[1] The testimony as to the journey to Sheboygan, Michigan, was admitted into evidence even though it was at variance with the indictment which made no reference to Sheboygan in any of the counts.

when one considers the evidence that both of these women had worked in such houses prior to the transportation charged in the indictment (R. 37, 63), that they procured whatever jobs they had by their own efforts (R. 86, 89), that it was their own idea to go to Chicago (R. 39, 50), that there was no conversation with the petitioners as to the work Juanita Marquis was to do in Milwaukee (R. 104), that it was her idea to go to Sheboygan, Wisconsin (R. 104).

The only remaining bit of evidence is that Hunt telephoned and Henderson appeared. Even this telephone call is not proved conclusively as the witness Glenn Henderson (R. 122) stated that he had not received any telephone call from Hunt on that day. Had the call been made, this would not prove that the petitioners intended to transport these women for the purpose of prostitution. The telephone company's records would have proved this all-important link. Here the Government failed again. Clearly, evidence of this character is insufficient to prove the essential element of intent beyond all reasonable doubt. *Mimmer* v. *United States,* 57 Fed. 2nd. 506, *Kelly* v. *United States,* 297 Fed. 292.

The petitioners respectfully urge that the insufficiency of the evidence is appropriate for consideration by this Honorable Court due to the unusual circumstances of the case.

II.

The petitioners were denied a fair and impartial trial by being tried on all six counts of the indictment.

The Court erroneously overruled the petitioners' motions to compel an election made before the commencement of the lawsuit (R. 19, 20) and at the close of the Government's case (R. 98), and at the close of all the evidence (R. 142).

Under this indictment, six separate sentences could have been imposed. The indictment did not enable the petitioners to know just what charge they should prepare to meet. It was impossible to have a fair trial unless the Government was compelled to choose which of the charges it intended to prosecute.

The Circuit Court of Appeals, in passing on the question of the denial of the petitioner's motion to compel an election, said:

> "The six counts here charged were properly joined together, since all arose out of the same general transaction." (R. 270).

The Court overlooked the fact that although all the counts arose out of the same transaction, prejudice may still result when the accused is tried on all of them. While the joinder of several offenses in one indictment is a matter resting largely in the discretion of the Trial Court, the multiplication of offenses must not be so great as to tend to confound the accused or distract the attention of the jury. When such is the case, the Court should compel an election by the Government. *Morris* v. *United States,* 161 Fed. 672.

The petitioners being tried on all six charges of the indictment, evidence by the Government applied to some of the counts and not to the others. The difficult task of determining and unravelling what evidence was to apply to a particular charge was left to the jury. This naturally resulted in prejudice and confusion.

The case of *United States* v. *Silverman,* 106 Fed. 2nd. 750, is clearly applicable. The Court there said:

> "The prescription 'which may properly be joined' brings into action no rule of thumb, but rather the sound discretion of the trial court exercised to prevent undue prejudice to the accused. . . ."

"As was pointed out by Talbot, J. in *R.* v. *Southern* (1930, 22 C. A. R. 9), a multiplicity of charges of the same kind may of itself lead the jury to infer the guilt of the accused without paying sufficient attention to the weight of the actual evidence adduced in support of each of the separate alleged offenses. Again, *numerous counts may simply lead to a mistrial owing to general confusion of what evidence was germane to each of the several charges.* . . . Yet another reason why it may be undesirable that the jury should consider more than one charge at a time may be that one of the alleged crimes is so serious that they ought to give their undivided attention to that crime alone." (Italics ours.)

Recognizing the discretionary power of the Trial Court, Petitioners contend that there was such a gross abuse of its discretion as to be tantamount to depriving them of a fair trial according to due process of law, guaranteed by the Fifth Amendment to the Constitution of the United States.

III.

Failure of the Trial Judge to maintain an attitude of unswerving impartiality between the Government and the accused was a denial of due process of law and violated the petitioners' right to a fair and impartial trial, by

(a) *Limiting the right of cross-examination directed to the credibility of Government witness.*

Upon cross-examination of Viona Barker, the Trial Judge sustained in excess of fifteen objections to questions being asked of the witness.

These questions may be grouped into (1) questions seeking to determine whether she had ever been to Chicago

before the time indicated in the indictment (R. 40, 41, 43); (2) questions seeking to determine her age which became an important contested issue (R. 41, 44); (3) questions relating to her desire and willingness and voluntariness to go to Chicago (R. 42); (4) questions relating to her prior use of an assumed name (R. 43); and (5) divers questions such as whether she despised Henderson (R. 38), or inquiry as to whether Hunt induced her to give herself up to debauchery or engage in other immoral practices (R. 44).

Before deciding whether the Trial Judge properly sustained the objections of counsel for the Government to the foregoing questions, consideration should be given to the precise issues sought to be proved by the answers to such questions.

The series of questions pertaining to a prior visit of Viona Barker to Chicago was of especial importance for the jury in properly evaluating the credibility to be given to her entire testimony. To illustrate this series of questions and the rulings of the Trial Judge, we cite the following from the cross-examination of Viona Barker:

> "Mr. Kutner: Were you ever in Chicago before the time you came from Benton Harbor to Chicago?
>
> Mr. Gerber: It is objected to as immaterial and irrelevant.
>
> The Court: Sustained.
>
> (Proceedings outside the presence of the jury.)
>
> Mr. Kutner: She testified before that that was the only time she was in Chicago.
>
> The Court: What is the difference? Sustained.
>
> Mr. Kutner: It goes to the question of credibility.
>
> The Court: No, sustained." (R. 40.)

The obvious importance of this line of questioning becomes apparent when we recall that, by the Trial Court's own

instruction, "A witness may be impeached by disproving the facts testified to by him or her" (R. 179).

That this Government witness had been previously in Chicago, and the circumstances thereof would indicate a desire and purpose on her part to return to Chicago at the time involved independent of any intention on the part of Petitioners to cause her to be transported, or to go to Chicago as alleged in the first three counts of the indictment (R. 3-4).

The cross-examiner's obvious purpose was to show that Viona Barker had testified at the preliminary hearing before the Commissioner as to her age which was a different age than that given on the trial, that she had previously used an assumed name, that she despised one of the petitioners, all of which were important in establishing her credibility, incredibility and bias.

By limiting the cross-examination thusly, the Trial Court, and, it is respectfully submitted, the Opinion of the Seventh Circuit Court of Appeals are in conflict with the decisions of this Court and the decisions of the Second, Fourth, Fifth, Eighth, Ninth, and Tenth Circuit Courts of Appeals.

> "Cross-examination is a matter of right. It is prejudicial error to limit cross-examination of a witness when the purpose of cross-examination is to show bias, coercion of situation, or expectation or hope of reward."
>
> *Alford* v. *United States,* 282 U. S. 687.
> *Farkas* v. *United States,* 2 Fed. (2nd) 644, C. C. A. 2).
> *King* v. *United States,* 112 Fed. 988, (C. C. A. 5).
> *Collenger* v. *United States,* 50 Fed. (2d) 345 (C. C. A. 7).

Cossack v. *United States,* 63 Fed. (2d) 511 (C. C. A 9).

Asgill v. *United States,* 60 Fed. (2d) 776 (C. C. A. 4).

Mimmer v. *United States,* 57 Fed. (2d) 506 (C. C. A. 10).

Heard v. *United States,* 255 Fed. 829 (C. C. A. 8).

(b) *failing to give requested instructions as to the credibility of the girls involved in the offense with which the petitioners were charged.*

A number of instructions were tendered to the Trial Judge (R. 111-112). The tendered instructions cautioning the jury as to the weight to be given the testimony of a witness who has morally implicated herself in the act committed, follow:

1. "In weighing and considering the credibility of witnesses the jury should consider whether any witness has been interested or hopes to receive any reward, immunity, or benefit from the prosecution of the case, or has in any other way become interested or had her feelings or passions enlisted against the defendants; and if the jury shall find any such witness has sustained or does sustain such relation in the case as would naturally tend to interest her, then it is the duty of the jury to consider whether such feelings or interests of such witness has had any effect upon such of her testimony as is material to the issues in this case."

2. "The Court instructs the jury that where a witness, from her own evidence, morally implicates herself in the act committed, you should consider that circumstance as bearing on her credibility. If you believe that the testimony of any witness is tainted and her conduct was as culpable as that of the defendant, you are to view such evidence with the greatest

caution, because of the guilt which she has to admit against herself."

3. "The Court instructs the jury that an accomplice is one who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. And, if in considering the testimony in this case, you find that any witness of the Government was an accomplice, you are instructed that the testimony of an accomplice is liable to grave suspicions, and you should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all the other evidence in the case; and you should consider the influence under which such testimony is given, and whether the purpose of the witness is to obtain some benefit to herself, or to gratify her malice, then you ought not to convict upon such testimony, unless, after a careful consideration of such testimony, you are satisfied beyond a reasonable doubt of its truth, and that you can safely rely upon it."

4. "The Court instructs and cautions the jury against too much reliance upon the testimony of accomplices and the jury must find corroborating testimony before giving credence to such testimony. The jury may disbelieve the testimony of accomplices altogether if they believe it untrue."

5. "The Court instructs the jury that one who is involved either directly or indirectly in the commission of a crime or one who knowingly and voluntarily cooperates with and assists, advises, or encourages another in the commission of a crime regardless of the degree of his or her guilt is an accomplice. You are instructed that you should receive such testimony with great caution and scrutinize it with care and should subject such testimony to a careful examination in the light of the other evidence in the case, and unless

you are convinced of the defendant's guilt beyond a reasonable doubt you should find the defendant not guilty." (R. 111-112.)

None of the above instructions was given. Nor was the jury otherwise cautioned in weighing the credibility of the testimony of these women involved in the interstate transportation. The many cases cited, *supra,* sustain the practice of giving these "cautionary" instructions.

The attention of this Court should be directed to the entire record wherein the conviction of petitioners must largely be regarded as resting upon the uncorroborated testimony of the two women involved in the charge who were the main Government witnesses. However, argument on the failure to give the above instructions does not revolve upon any sole consideration that the testimony of the Government witnesses may be uncorroborated for a proper conviction, but upon the broad consideration that the caliber of such testimony is substantially unsatisfactory.

A leading case detailing the general problem is *Freed* v. *United States,* 266 Fed. 1012, wherein it is stated:

> "At common law, the uncorroborated testimony of an accomplice will support a verdict of conviction. *But the decisions all recognize the unsatisfactory nature* of such testimony. * * *
>
> "Coming back to the present case, unquestionably, the jury might have found that each of the three women who testified was an accomplice as to the others. *Bennett* v. *United States,* 227 U. S. 333, 339, 33 Sup. Ct. 288, 57 L. Ed. 531. Not only were these witnesses accomplices as to one another, but under the evidence, they might have been found guilty of conspiracy. *United States* v. *Holte,* 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. 504, L. R. A. 1915, 281 * * * (Italics ours.)

"While it is not improbable that the same result would have been reached, had the court cautioned and advised the jury as to the danger of convicting upon the uncorroborated testimony of accomplices, it is not for us to speculate upon this question and resolve it against the accused. * * * (Italics ours.)

"The question which the defendant sought to have brought to the attention of the jury, presenting a material, if not vital, issue in the case, was not even mentioned. * * *

"* * * The jury may convict without corroborating evidence, but *in a case like the present the accused is entitled to have the court first advise and caution the jury."* (Italics ours.)

To the same effect are the following cases:

United States v. *Lancaster,* Fed. Cas. No. 15,556, 2 McLean 431.
Egan v. *United States,* 287 Fed. 958.
Rossi v. *United States,* 9 Fed. 2nd 362.
Outlaw v. *United States,* 81 Fed. 2nd 805.
Craig v. *United States,* 81 Fed. 2nd 816.
Lett v. *United States,* 15 Fed. 2nd 686.

(c) *Giving an improper instruction as to "debauchery" and failing and refusing to give proper requested instruction.*

Several counts in the indictment (R. 3) against the petitioners concern transportation or inducing, enticing and impelling the Government witnesses or one of them to give themselves, or herself, up to "debauchery and to engage in other immoral practices."

Instead of the instructions given by the Trial Judge, which had the effect of making prostitution, debauchery

and other immoral purposes more or less synonymous terms (R. 176), Appellant requested the following instructions:

> "The jury is instructed that Count Two and Count five of the indictment charges the defendants with transporting interstate Viona Barker and Juanita Marquis for the purpose of giving themselves up to debauchery and engaging in other immoral practices, and the jury is further instructed that sexual debauchery is two-fold, and includes both excessive indulgence and seduction from virtue and the jury is further instructed that if they find that there is no excessive indulgence and seduction from virtue, then these defendants, or either of them should be found not guilty on these counts."

"Debauchery" is a word of several meanings. Its sexual meaning is two-fold; excessive indulgence and seduction from virtue. *King* v. *United States,* 55 Fed. 2nd 1058. In one sense, the word is a synonym for "seduce." *Van Pelt* v. *United States,* 240 Fed. 346.

The personal history of both women indicates that they had both engaged in prostitution before either had met the petitioners. Thus, from the evidence it is clear that under the proved circumstances there was no seduction from virtue. Had the jury been properly instructed no one can say what the verdict would have been.

It is clear that prejudicial and fatal error occurred by the refusal of the trial judge to give a properly requested instruction relative to the term "debauchery" and by the giving in its stead of an improper instruction.

(d) *Permitting improper redirect examination, introduction of rebuttal evidence anticipatory of the defense, and admission of improper testimony relative to statements made by Hunt.*

To offset variance and contradictions in the testimony of the main Government witnesses, evidence was introduced in an attempt to demonstrate that such evidence was induced by a supposed gestured threat.

This testimony was given in the Government's case-in-chief, on the redirect examination of Juanita Marquis, one of the girls used as a Government witness (R. 79), in the direct examination of Joseph E. Tobin, Chief Deputy United States Marshal (R. 80), and upon direct examination of Minnie R. Kelly, a Clerk for Commissioner Walker (R. 82).

The nature of the above evidence was clearly rebuttal which should not have been permitted in the Government's case-in-chief. Anticipation of a defendant's defense is clearly prejudicial in a criminal case, especially in view of the constitutional right of a defendant not to testify in a criminal proceeding or, in fact, to introduce any evidence. As is true in this case, Hunt did not take the stand, and the Government would not have been afforded any opportunity to introduce any rebuttal testimony at all, had it not been for the use of other defense witnesses.

The recent case of *Luse* v. *United States*, 49 Fed. 2nd, 241, is squarely in point. A detailed statement of it is appropriate. An issue of perjury was raised and decision upon this issue depended on the whereabouts of one W. T. Blaylock. The Government contended that he was in Texas on a certain date and introduced witnesses to show this.

Then it introduced a contract purporting to be signed by Blaylock in Los Angeles on the date in question. The

tendency of this instrument was to rebut the Government's contention that Blaylock was in Texas, so

> "To overcome this evidence, which at best was anticipatory of Appellants' defense, evidence was introduced and handwriting experts were called in an attempt to establish that the signature on the document was in the simulated handwriting of W. T. Blaylock, and that this simulation had been accomplished by means of tracing a genuine signature of Blaylock's. This evidence might have been proper if the defendant had first offered the document to prove the presence of Blaylock in Los Angeles on the 6th day of January, and if such document had been received either with or without the objection on the part of the Government, but to introduce such evidence in the first instance could hardly avoid impressing the jury that there was something wrongful in the tracing of the signature of Blaylock * * *."

In reversing the case, the Court stated:

> "It is true that this testimony" (by defendants after Government's case-in-chief was ended) "made the evidence of the Government in that regard proper rebuttal testimony, but it does not follow that the error in admitting it in chief is not prejudicial."

Of considerable damaging and illegal effect upon petitioners' cause was the admission into evidence of a purported conversation between Government witness, Thomas F. Mullen, special agent for the Federal Bureau of Investigation, and Hunt while in "custody" of the Chicago police. This conversation, as related by Agent Mullen, is in the nature of a confession by Hunt, and the rules for the admission of confessions are clearly applicable.

Firstly, a review of Mullen's testimony indicates:

"The Witness: * * * I had a conversation with Bud Hunt right after the time I got through talking with Glenn Henderson at the Woodlawn Police Station. I think Sergeant Sikorski was present.

Mr. Gerber: Q. Tell us the conversation, please.

Mr. Kutner: I wish to note an exception to this unless a proper foundation is laid.

The Court: Overruled.

(Exception taken by the defendants.)"

* * *

"The Witness: * * * I then asked him whether or not he had anything to do with the transporting of these girls from Benton Harbor, Michigan, to Chicago. He then said some time in the early part of August, Juanita Marquis came to him and wanted to know if he could arrange to place her in a house of prostitution, whereby she and Viona Barker could work as prostitutes. He then said that he got in touch with Glenn Henderson. I asked him when that was and he said it was on a Saturday afternoon.

At this point I asked him if he cared to make a signed statement, to which he replied, 'No, I am in just as deep as Henderson' (R. 91, 92)."

Upon cross examination, the agent testified as to his conversation with Hunt:

"* * * I only had one talk with Hunt and that lasted probably about twenty minutes. * * * *I believe I mentioned to Hunt the fact that the girls had made complete statements to me.* * * * I mentioned Henderson otherwise to him after he had started to relate to me that he had contacted Henderson by telephone and he was to meet him at the Palm Gardens in Benton Har-

bor that night, that was when I told Hunt I had talked to Henderson. That is the point when I asked Hunt whether or not he cared to make or, rather, give me a written statement, and he replied that he was in just as deep as Henderson'' (R. 93-94). (Italics ours.)

Secondly, the principles to be followed for the admission of confessions have been enunciated many times and are not in dispute.

The Supreme Court has held, in *Brown* v. *Walker,* 161 U. S. 591, the maxim *Nemo tenetur selpsum accusare* (No man is bound to criminate himself) has the impregnability of a constitutional amendment.

To make a confession of one charged with crime admissible, it must be shown to have been without compensation or inducements. *Sorenson* v. *United States,* 143 Fed. 820.

As was said by the Court in *United States* v. *Kallis,* 272 Fed. 742:

> ''Statements made by a person accused or suspected of crime, to a Government agent investigating White Slave charges and while the accused was being held in custody by authorities who did permit the Government agents to have access to the prisoner, were not admissible against the prisoner in a subsequent criminal prosecution for the offense being investigated by the Government agent.''
>
> ''The maxim, '*Nemo tenetur selpsum accusare,*' has its origin in a protest against the inquisitorial and manifestly unjust method of interrogating accused persons which has long obtained in the continental system (and Mr. Justice Brown might have added, 'suspected persons'), and until the expulsion of the Stewarts from the British throne, in 1688, and the erection of addi-

tioned barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. * * * So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law; so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional amendment. *Brown* v. *Walker,* 161 U. S. 591, 596, 16 Sup. Ct. 644, 81 Fed. 842.

"The questioning by or with the consent of his official captor, of a prisoner, is essentially inquisitorial in its nature. He is confined, and perforce must submit to such questions. True, he may remain silent, but he cannot escape the questions, as he might if he were physically free. The actual existence of duress, arising from the fact that he is confined and cannot escape his questioner, is sufficient, and requires that he be advised that he is not compelled to answer, and, if he does so, his answers will be used against him. Fairness can require no less. So much at least is guaranteed by the Fifth Amendment.

"While it may be that many know their rights, and even when in prison, have the will and courage to stand upon them, there certainly are others who do not. The safer and better course to pursue is to require evidence that each and every prisoner has been advised of his right to remain silent, and warned of the danger in speaking, before any statement made is admitted, rather than enter upon a more or less speculative inquiry as to whether the statements of accused were made voluntarily or not. In the nature of things, it often happens, not only upon the examination in the jail, but upon that in court regarding the circum-

> stances of the inquiry at the jail, that there are many against one, the accused. Whether it arises from zeal or prejudice, born of their calling, the nature of the accusation or situation, or all of these and other things, it does not matter—consciously or unconsciously, upon such an inquisition, the police, and officers having similar duties, often array themselves against the accused."

Thirdly, Mullens' testimony was legally inadmissible according to the cases, though Mullen did not tell Hunt that he had an absolutely good case against him as was true in the *Sorenson* case, *supra,* the result reached by the officer's remarks that he had a complete statement from the girls was identical. The effect of that statement, with all the implications and inferences flowing from it, on the mind of Hunt could only have had the same effect as the remarks by the officer that he had a good case against him.

The *Kallis* case, *supra,* appears to be on "all fours" with the present case. There was absolutely no showing of the voluntary character of Hunt's statements, if so made, in Mullen's testi nony. At no time did the Government agent testify that he had informed Hunt, while in custody, of his constitutional rights, to wit: that anything he might say could be used against him or for him.

The ensuing essentially involuntary character of Hunt's statements should not have been permitted to be told by the Government agent to the jury. The Trial Judge was afforded ample opportunity to correct this prejudicial error, but no avail was made of any of such occasions. It might be well to consider Mullen's incredibility by his own admissions (R. 95) as discussed herein in the Statement of the Case.

Fourthly, Henderson was not present when the alleged statement by Hunt of "I am in it just as deep as Hender-

son", was made. It is this indentical statement, virtually an admission and confession of guilt which the Trial Judge was informed by sworn petition for severance, in advance of the trial, would be made. The admission was never sanctioned, prompted, encouraged, admitted or adopted by Henderson. Every act and deed of Henderson are in conflict with any such admission—we believe it was never made. Mullen's statement of how and when it was made appears to be a *non sequitur*. It's highly improbable that the all damaging response "No, I am in just as deep as Henderson" would be made to the question, "you care to make or give a statement?" (R. 91, 92). The answer and question do not make sense—emanating from the mouth of a Department of Justice Agent, this statement, by Hunt of Henderson's guilt, turned the tide against Henderson and he was found guilty on his co-defendant's reported statement. None of the other officers corroborate Mullen. By Hunt not taking the stand the damaging effect of the statement became intensified and Henderson's fate became certain before the jury.

In *White et al* v. *People*, 81 Ill. 333, p. 338 the Court said, after remarking that such evidence is very damaging to the party against whom such testimony was not competent: "In such cases it is very difficult for a juror to divest himself, under instructions, from the illegitimate effect of such evidence upon the party who ought not to be affected thereby."

The testimony of Agent Mullen concerning Henderson's statements or failure to make any statements was admitted over objection. He was under arrest (R. 91, 118). No charges at the time were preferred although he was in a cell, threatened with bodily injury and was without benefit of counsel. He was not warned of his constitutional rights but he told Mullen he wanted counsel before he would answer any question (R. 119). Under these circumstances

he was under no obligation to answer and all testimony as to the incident was inadmissible. The Court in the *United States* v. *Kallis, supra,* frowned upon this kind of evidence. The admission of this testimony was prejudicial error.

IV.

The prosecutor resorted to prejudicial misconduct and petitioners were denied a fair and impartial trial.

Counsel for the Government, in his closing argument to the jury propounded the query to them as to whether or not Hunt was acting as a "talent scout" for Henderson (R. 145).

> "Mr. Kutner: I object to that phrase. That is very prejudicial, your Honor, and improper.
>
> Mr. Derzon: I move that that he stricken.
>
> The Court: What was it?
>
> Mr. Kutner: 'Talent scout'.
>
> Mr. Gerber: I told the jury they have a right to ask themeselves whether or not Hunt, in talking to these girls about places to work, was acting as a talent scout.
>
> The Court: Oh, proceed. Overruled.
>
> (To which ruling of the Court, the defendants then and there, by their respective counsel duly excepted)" (R. 145).

To understand the highly prejudicial nature of Government counsel's remark, one must examine the meaning of "talent scout." Although the term is of very common usage, apparently the trial judge was unfamiliar with its usage and meaning. However, counsel for the Government was well aware of its potent meaning by the use

made of the term and it cannot be assumed that the jurors, as average and reasonable men and women were not familiar with its significance.

"Talent scout" in its ordinary usage indicates a person in search of prospective screen or stage stars. For such purpose, a "talent scout" will widely and intensely scour the country to discover a "find". An understanding of the term "talent scout" is necessary to a proper appreciation of the resulting prejudice caused by its misuse in this case.

The words in their present usage suggest a person in search of prospective prostitutes. To so brand the petitioners, instantly placed into the jurors' mental perceptions, the combined connotations of this term. Petitioners were immediately placed in the business of operating a "white slave" combine. No longer was Hunt an individual living with his mother in a small Michigan town. Hunt was now a man of countless associations traveling about the country for Henderson in an effort to ensnare and lure innocent girls into a vile and repugnant practice of prostitution. There is *no* evidence of any nature in the case to indicate that Hunt was a "talent scout" nor that Henderson engaged him or used him as such. To so impress and mislead the jurors is beyond the province of the Government prosecutor. *Berger* v. *United States,* 295 U. S. 78. *Speiller* v. *United States,* 31 Fed. 2nd 682.

If the mere putting of the question, as to the *practice* of putting girls into prostitution, to the defendant in the *Speiller* case was very prejudicial and damaging, then the description of Hunt, in this case, where he did not take the stand, as a "talent scout" for Henderson is many times more prejudicial and damaging. "Talent scout" not only suggests a practice of putting girls into prostitution, but implements and dramatizes this suggestion in that such "practice", with Henderson as the brains, is accompanied by large and powerful cooperative forces as a part of

some tremendous country-wide syndicate trafficking in women. It is not a fair statement or inference under the circumstances. Both Henderson and Hunt were unduly prejudiced by this unfair and improper remark.

The Trial Court itself indulged in improper remarks. During Henderson's cross examination, the Government attorney inquired how much money he had. On refusing to answer the question, the record speaks as follows (R. 122):

> "Mr. Henderson: I consider it personal how much money I had with which to go into business at that time. I refuse to answer how much I had.
>
> Mr. Gerber: The witness refuses to answer the question.
>
> Mr. Derzon: I think the witness is within his rights in refusing to answer how much money he has.
>
> The Court: That is an inference the jury can make. They have his answer."

The Court properly should have sustained defendant in his refusal to answer this incompetent question. It should have refrained from making the remark that the jury could draw an inference because they undoubtedly took it that they could make an unfavorable inference. The jury quickly adopts and is influenced by any suggestion made by the Court. The inquiry was outside the boundary of fair questioning. There was no legitimate inference the jury could properly make because of Henderson's answer. Yet the Court's statement virtually suggested to the jury that this all should be construed against the defendant. Our point is made clearer by the language used in *Hicks* v. *United States,* 150 U. S. 442:

> "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight and that his light-

est word or intimation is received with deference and may prove controlling."

V.

The indictment is vague, indefinite, uncertain and defective, thereby failing to inform the petitioners of the nature and cause of the accusation, and the variance between the indictment and the proof is prejudicial error.

The indictment is insufficient in law to conform to the Sixth Amendment of the United States Constitution which provides that the defendant in a criminal case shall be informed of the "nature" and "cause" of the accusation.

It may be sufficient to inform the defendant of the nature of the accusation, if he is charged with a criminal offense in the language of the statute creating that offense, *but the Constitution requires that a defendant shall be informed of the cause of the accusation in addition to informing a defendant of the nature and thereby requires additional facts to be charged in an indictment when the statute fails to set out particular acts constituting the cause.*

Counts 2 and 5 of the indictment (R. 3) are insufficient in that they state:

> "* * * For the purpose of giving themselves up to debauchery and to engage in other immoral practices."

Such averments are insufficient as the crime is not charged with precision and certainty. Those words of the statute do not suffice as they do not fully, directly, and expressly set forth all the elements necessary to constitute an offense. *Evans* v. *United States*, 153 U. S. 584. Since the White Slave Act refers to that phase of debauchery consisting of "sexual actions", an indictment should

specify the character of the debauchery alleged. *King* v. *United States,* 55 Fed. 2nd 1058.

The Circuit Court of Appeals (R. 271) said:

> "As a matter of fact, defendants could hardly claim doubt in this case as to what they had to meet. They were tried before on this same indictment."

Apparently the Court overlooked the fact that the retrial of a case is a trial *de novo.* It is not to be assumed that the defendants will expect the same evidence to be produced in the retrial of the case that was produced in the first trial. The fact that the Petitioners were previously tried under the same indictment, is no justification for the Trial Court allowing the Government to introduce evidence not restricted to the particular transactions alleged in the indictment.

In the opinion of the Circuit Court of Appeals (R. 271) the Court said:

> "They named the date of the trips, the girl or girls involved, the mode of transportation, and the object of transportation, using the statutory terms such as, 'for the purpose of prostitution'."

Actually Counts 2 and 5 of the indictment state: "For the purpose of giving themselves up to debauchery and to engage in other immoral practices."

In criminal cases the accused has the constitutional right to be informed of the nature and cause of the accusation. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

U. S. v. *Cruikshank, et al,* 92 U. S. 542.
Miller v. *U. S.,* 136 Fed. 581.
Beck v. *U. S.,* 33 Fed. (2) 107.

Bowkin, et al. v. *U. S.*, 11 Fed. (2) 484.
Anderson v. *U. S.*, 260 Fed. 557.
Brenner, et al. v. *U. S.*, 287 Fed. 636.
Fontana v. *U. S.*, 262 Fed. 283.
McKenna, et al v. *U. S.*, 127 Fed. 88.
Bartlett v. *U. S.*, 106 Fed. 884.
Pierie v. *U. S.*, 275 Fed. 352.
Collins v. *U. S.*, 253 Fed. 609.

The indictment should fall in the face of established law, because it is fatally defective, and a nullity. The Motion to Quash and Demurrer to the indictment should have been sustained (R. 7, 8, 9). The Motion for Bill of Particulars should also have been granted (R. 10, 11, 12, 13).

VI.

Failure of the Court to grant the petitioners a separate trial was an abuse of the Court's discretion and violated the petitioners' right to a fair and impartial trial.

Petitioners requested a separate trial from each other (R. 14, 16). Such was denied by the Court.

The Circuit Court of Appeals (R. 270) in passing on the refusal of severance said:

> "The two defendants acted jointly in most of the transactions which went to make up the crime charged. Most of the acts were done in each other's presence."

The record shows that the drives to Chicago from Milwaukee to Sheboygan, and from Aurora to Chicago were made by Henderson alone; the defendant Hunt was not present. These transactions were vital acts which went to make up the crime charged.

And the Circuit Court of Appeals added (R. 270):

> "Justice could be better served by a joint trial."

Apparently the Court did not sufficiently consider the probable and inevitable effect on the jury of testimony by Juanita Marquis (R. 56) as to conversations with Henderson about Hunt's "mad spell". The Trial Judge and the Circuit Court evidently failed to consider the fact that a joint indictment is a several one against each of the defendants, *United States* v. *Davenport,* 25 F. Cas. No. 14,920; *United States* v. *LeFanti,* 255 Fed. 210, and that, even though two men are charged with a crime in one indictment, acts and conversations committed outside of the presence of one are not admissible as evidence against the other.

Assuming that the crime was complete when Juanita Marquis was transported from Chicago, Illinois, to Milwaukee, Wisconsin, the conversations between Henderson and Juanita should not have been admitted as against Wilbur Hunt. And conversations between Juanita and Henderson while making the journey between Milwaukee and Sheboygan should not have been admitted as evidence against Wilbur Hunt.

Assuming that a violation was committed at the time of the crossing of the state line between Illinois and Wisconsin, the conversations with Henderson after the state line was crossed were not properly admitted as to Wilbur Hunt.[1]

The statement allegedly made by Hunt, as testified to by Agent Mullen, "I am in it just as deep as Henderson," was such a damaging statement to Henderson's cause that a separate trial should have been granted him, and the Trial Court was informed in advance of the trial that this statement would be testified by Agent Mullen in the Petition for severance, filed before the trial by the defendant Henderson. It was not competent against Henderson, as

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1 It is well to note the absence of a conspiracy charge in the indictment.

he was not present at the time it was made. It had an unquestionable, tremendous and illegitimate effect upon Henderson's cause and prejudiced him beyond measure. It was the one circumstance, we are convinced, which prompted a verdict against Henderson.

The United States Supreme Court in a leading case on the subject of severance through Justice Story, has stated, in more particularity, that:

> "In our opinion, it is a matter of *sound* discretion, to be exercised by the Court *with due regard and tenderness to prisoners according to the known humanity of our criminal jurisprudence.*" *United States* v. *Marchant,* 12 Wheat. 480, 483 (25 U. S. 297, 300). (Italics supplied.)

The record in this case clearly indicates such abuse of discretion in failing to grant petitioners a separate trial so as to necessitate a reversal.

Such evidence was highly prejudicial to the petitioners and, further, justice could not be better served by a joint trial since the petitioners' defenses were essentially different, and the method of presentation of these defenses by respective defense counsel also differed.

CONCLUSION.

Petitioners have been deprived of a fair trial by the improper and prejudicial conduct of both the prosecutor and the Trial Judge. They were convicted without sufficient evidence upon a fatally defective indictment. From the very outset of the case a spirit of hostility took hold which pervaded the entire trial. A jury could not escape its unwholesome effect—prejudice resulted.

Rules of law are of no value if those very rules, defined by the Constitution and the laws of the land intended to

insure every accused a fair trial are not strictly and unequivocally applied. These benefits and privileges were not accorded to the petitioners.

Wherefore, it is respectfully submitted that this joint petition for writ of certiorari should be granted.

HENRY L. BALABAN,
Counsel for Petitioners.

LUIS KUTNER,
Of Counsel.

APPENDIX.

Title 18, Sec. 398. *Same; transportation of woman or girl for immoral purposes, or procuring ticket.* Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000.00, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910, c. 395, Sec. 2, 36 Stat. 85.)

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 300

WILBUR L. HUNT, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 301

GLENN HENDERSON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 269–271) is reported in 120 F. (2d) 592.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 21, 1941 (R. 272). Petition for rehearing was denied June 23, 1941 (R. 298).

Petition for certiorari was filed July 23, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether alleged insufficiency of two counts of a six-count indictment presents a proper question for review where a general sentence is imposed which does not exceed that which might properly have been imposed on any one of the four remaining counts.

2. Whether the trial court erred in refusing to compel the Government to elect upon which of the six counts petitioners would be tried.

3. Whether petitioners were improperly denied separate trials.

4. Whether the cross-examination of one of the Government's witnesses was unduly restricted.

5. Whether the trial court erred in admitting evidence alleged to have been in anticipation of the defense and in admitting testimony relative to an incriminating statement made by one of the accused.

6. Whether there was a fatal variance between the indictment and proof.

7. Whether the trial court erred in its instructions to the jury.

8. Whether it was prejudicial for the prosecutor to refer to one of petitioners as a "talent scout" for the other.

9. Whether the evidence is sufficient to support the verdict.

STATUTE INVOLVED

The full text of section 2 of the White Slave Traffic Act of June 25, 1910, 36 Stat. 825, 18 U. S. C. § 398, is set forth in the Appendix, *infra*, p. 13.

STATEMENT

Petitioners were convicted (R. 181) and sentenced (R. 227) in the United States District Court for the Northern District of Illinois on all six counts of an indictment (R. 3–5) charging violations of the White Slave Traffic Act. The first three counts (R. 3–4) charged the petitioners with transporting and causing to be transported in interstate commerce two girls, Viona Barker and Juanita Marquis, from Benton Harbor, Michigan, to Chicago, Illinois, for the purposes set forth in the Act; and the last three counts (R. 4, 5) charged both men with the same offenses in connection with the transportation of Juanita Marquis from Chicago, Illinois, to Milwaukee, Wisconsin. Each petitioner was sentenced generally to imprisonment for five years (R. 227).

The Government's case may be summarized as follows:

Petitioners are lingerie and shirt salesmen, selling at least in part to prostitutes (R. 92, 121, 133–

134). In August 1939, at Benton Harbor, Michigan, petitioner, Hunt, told Viona and Juanita that he could get work for them in a house of prostitution through a man he knew in Chicago (R. 25, 26, 27, 50). He then communicated with petitioner, Henderson, who came immediately and drove the girls to Chicago (R. 27, 50, 51). On the way to Chicago he told them he would find them a place in a house of prostitution "as soon as possible" (R. 28) and that he would furnish them with clothes (R. 27, 52). He also told them that if they ran afoul of the law they were to say that they were 22 years old and from Southern Illinois (R. 27–28, 52). The girls were each 19 years old at the time (R. 28, 63).

Hunt rejoined the group in Chicago later that day (R. 29, 43, 45, 52, 68), and petitioners went to Aurora, Illinois, to see Mabel Wright, the owner of a house of prostitution known as the LaSalle Hotel, and made arrangements for the employment of Viona (R. 87). The next morning petitioners bought clothes for the girls (R. 29, 45, 47, 52, 53, 69). The following day, they brought the clothes to the girls at their hotel (R. 29, 52, 53, 69) and drove both of them to Aurora (R. 53). On the way, Viona was told that she was being taken to a "nice place" which she would like, and where she would be treated well and given instructions (R. 31). She was directed to save all her money and told that Henderson would visit her weekly (R. 31). Viona remained at the LaSalle Hotel as a prostitute; she

gave part, at least, of her earnings to Henderson (R. 32, 33).

Petitioners meanwhile drove Juanita to Milwaukee (R. 54, 70); petitioners told her that she was being taken to a house of prostitution where she would be treated well and would earn "lots of money" (R. 54). Hunt did not "come right out" and tell Juanita to give him any money but "he said I was to save my money" (R. 54). Petitioners brought her to the Linn Tavern, where she remained for several days working as a prostitute until she went to a hotel in Milwaukee (R. 55, 84). Henderson thereafter telephoned Juanita to tell her that Hunt was angry because he could not find her (R. 56).

The next morning Henderson called for Juanita and took her to a house of prostitution in Sheboygan, Wisconsin, where he had made previous arrangements for her reception (R. 56). He asked her for her money, and she gave him $14 (R. 56). Juanita worked as a prostitute in Sheboygan, and from time to time turned over the money she earned to Henderson (R. 57). Some days later, Henderson brought Juanita back to Chicago and then to Aurora, where he had arranged with Mabel Wright to take Juanita in at the LaSalle Hotel (R. 57, 58, 87). Juanita again worked as a prostitute, and turned her earnings over to Henderson (R. 59).

About a week later Henderson agreed to drive the two girls to Chicago so that they could take a train

and go home (R. 33). En route to Chicago, they stopped at a roadhouse, where they were joined by one Buck and another man (R. 60). Henderson took $35 from Juanita's purse (R. 60), against her objections, saying "I will keep it for you" (R. 34). It was there arranged that Henderson and Juanita would drive ahead into Chicago, and Buck and his friend would follow them with Viona (R. 60). Viona was taken by a short cut to the north side of Chicago, and one of the two men wanted to take her to a hotel, but she refused and broke away from him (R. 35). She went to Henderson's room to get her clothes and find Juanita (R. 35). Juanita meanwhile had been driven to a hotel in Chicago by Henderson, but when he did not return, she left to look for Viona (R. 60). By that time, Viona had summoned the police (R. 35). As the police arrived, Juanita came around the corner alone, and the girls were taken to a police station (R. 36).

At the police station the girls identified Henderson and Hunt as the men who had transported them (R. 36, 61). Thomas F. Mullen, an agent of the Federal Bureau of Investigation, interviewed both men. Henderson remained silent. Hunt, however, said the girls had approached him in Benton Harbor about finding a place in a house of prostitution and that he had called Henderson; that he had driven from Chicago to Aurora with Henderson and the two girls; but that the trip from Chicago to Milwaukee was made by himself and Henderson alone.

When Mullen asked him if he wanted to give or make a signed statement, Hunt said "No, I am in just as deep as Henderson" (R. 90–92).

Thereafter a preliminary hearing was held before the United States Commissioner. While Juanita was testifying, the petitioner, Hunt, was facing her at the counsel table and kept looking at her "real hard," at the same time shaking his head negatively with his finger up to his mouth (R. 79, 80, 82). At the trial, Viona and Juanita, as well as the women who conducted the business of prostitution at the LaSalle Hotel and the Linn Tavern, testified for the Government. Henderson testified but Hunt did not. The jury returned a verdict of guilty on all counts in the indictment (R. 181).

ARGUMENT

1. Relying upon *King* v. *United States,* 55 F. (2d) 1058 (C. C. A. 10), petitioners argue (Pet. 37–38) that counts 2 and 5 of the indictment charging transportation of the girls for the purpose of giving themselves up to debauchery and of engaging in other immoral practices (R. 3) are vague and indefinite. The court below held (R. 271) that since the offense is charged in the language of the statute it is legally sufficient, citing *United States* v. *Lewis,* 110 F. (2d) 460, 462, 463 (C. C. A. 7), certiorari denied, 310 U. S. 634. Even apart from the legal sufficiency of these counts, no question is presented for review in this Court since the general sentence imposed (R. 226–227) "did not exceed that

which might properly have been imposed upon conviction under any single count." *Claasen* v. *United States,* 142 U. S. 140; *Evans* v. *United States,* 153 U. S. 584, 608; *Abrams* v. *United States,* 250 U. S. 616, 619.

2. Petitioners contend that the trial court was guilty of a "gross abuse" of discretion in refusing to require the Government to elect to prosecute them upon a single count (Pet. 17–19). But as the court below held (R. 270), the case plainly falls within the statute permitting joinder of offenses. Act of February 26, 1853, sec. 7, 10 Stat. 161, 162, 18 U. S. C. sec. 557.[1]

3. It is plain that no prejudice resulted from the trial court's refusal to grant petitioners separate trials. *Lucas* v. *United States,* 104 F. (2d) 225, 226 (App. D. C.). As the court below pointed out (R. 270), "they acted jointly in most of the transactions which went to make up the crime charged" and, even though the evidence in part showed acts and declarations of petitioners outside of each other's presence, the jury was repeatedly advised concerning the proper consideration to be given

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[1] Since the separate offenses charged were of the same class and were closely related as parts of a continuing enterprise, it cannot properly be said that the failure to require an election tended "to confound the accused or distract the attention of the jury" (Pet. 18). The trial judge did not, therefore, abuse his discretion in refusing to require an election. *Foster* v. *United States,* 256 Fed. 207, 209 (C. C. A. 5); *Moore* v. *United States,* 288 Fed. 249, 250 (App. D. C.).

such testimony (R. 24, 26, 27, 29, 33, 50, 51, 176, 177).[2]

4. Petitoners contend (Pet. 19–22) that the trial court unduly limited the cross-examination of Viona Barker relative to (1) whether she had ever been to Chicago before; (2) her age; (3) her willingness to go to Chicago; (4) her prior use of an assumed name; (5) whether she despised Henderson; and (6) whether Hunt induced her to engage in prostitution. As the circuit court of appeals held (R. 271), petitioners "were in no way prejudiced by such complained of limitation of cross-examination."

Viona admitted that she had previously been in Chicago (R. 45). The attempt to impeach her testimony by showing prior contradictory statements concerning her age and her willingness to go to Chicago was improper both because of the form of the questions and because counsel was attempting to impeach her by reference to his own notes of her testimony at the Commissioner's hearing, rather than by an accurate transcript (R. 40–42). Whether she had previously used the same pseudonym that she used in Chicago could have but little bearing upon her credibility. The inquiry concern-

[2] There was no essential difference between the respective defenses offered. Henderson testified, denying that the transportations were with the intent and purpose charged in the indictment, and Hunt did not testify at all. The only defense was that the incriminating testimony of the Government's witnesses was incredible.

ing the time when she stated that she despised Henderson (R. 38) was unnecessary to show the extent of her bias, since she freely admitted her hatred of Henderson (R. 46). Finally, whether Hunt had induced her to give herself up to debauchery and engage in other immoral practices (R. 44) was for the jury to determine upon all the evidence presented and not for Viona to answer.

5. The testimony regarding the gestured threats which petitioner Hunt directed toward Juanita at the Commissioner's hearing (R. 80–82) was not introduced in anticipation of petitioners' defense, as is contended (Pet. 27), but it was admissible as a circumstance tending to prove Hunt's guilt since it showed an attempt by him to supress or influence her testimony. *United States* v. *Freundich*, 95 F. (2d) 376, 379 (C. C. A. 2); *Hass* v. *United States*, 31 F. (2d) 13, 14, 15 (C. C. A. 9), certiorari denied, 279 U. S. 865. Nor was there error in admitting testimony concerning Hunt's statement that he was "in just as deep as Henderson" (R. 94), since the statement was freely and voluntarily made.[3]

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[3] The fact that he was in custody at the time would not, as petitioners urge (Pet. 33), of itself render it inadmissible. *Sparf and Hansen v. United States*, 156 U. S. 51, 55; *Pierce* v. *United States*, 160 U. S. 355, 357; *Bram* v. *United States*, 168 U. S. 532, 558; *Perovich* v. *United States*, 205 U. S. 86, 91; *Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *Wan* v. *United States*, 266 U. S. 1, 14. Nor was it necessary (Pet. 32) that he be warned that anything he might say could be used against him. *Wilson* v. *United States*, 162 U. S. 613, 623; *Powers* v. *United States*, 223 U. S. 303, 313, 314.

6. Petitioners assign error (Pet. 14, 37) upon the ground that there was a fatal variance between the indictment and proof. The court below properly held (R. 271) that there was no variance. As the court below further pointed out, the charge to the jury made clear precisely what transactions constituted the offenses for which petitioners were being tried and that evidence of other transactions should only be considered as bearing upon petitioners' original intent and purpose (R. 175).[4]

7. Finally, it is plain that petitioners' contention that "the evidence is utterly insufficient" (Pet. 15) is entirely without merit.[5] That the girls were transported and thereafter, with petitioners' aid,

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[4] Petitioners' contention (Pet. 22–25) that the trial court erred in failing to give "the usual accomplice instructions" and their proffered instruction regarding credibility (R. 111–112, 180), is wholly without merit since plainly none of the Government's witnesses were accomplices and the charge given (R. 178) adequately covered the question of the witnesses' credibility. Nor was it error to refuse petitioners' requested instruction defining "debauchery" (Pet. 25–26), for it was based upon the erroneous assumption that the statute required "seduction from virtue" (R. 112). The definition given by the trial court (R. 176) was clearly correct, for it is settled that "whether the woman be pure or impure, if her transportation be for the purpose of sexual immorality, the statute is violated." *Suslak* v. *United States*, 213 Fed. 913, 917 (C. C. A. 9).

[5] Petitioners also complain of the prosecutor's statement in his summation that the jury had a right to ask themselves whether Hunt was a "talent scout" for Henderson (R. 145). If anything, it dignified his activities and added little to the web of guilt in which he was enmeshed. Cf. *United States* v. *Goodman*, 110 F. (2d) 390, 395 (C. C. A. 7).

obtained work in houses of prostitution is clearly shown. It is a fair inference from all the evidence that the transportations were with the intention and purpose of inducing and enticing, if not compelling, the girls to prostitute themselves. The credibility of the Government's witnesses was for the jury to determine and, since the courts below have found the evidence sufficient, no reason appears why this Court should review it again. *Delaney* v. *United States,* 263 U. S. 586, 589–590.

CONCLUSION

Petitioners had a fair trial and the verdict of the jury is supported by the evidence. No question of importance is presented, and there is no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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AUGUST 1941.

APPENDIX

The Act of June 25, 1910, § 2, 36 Stat. 825, 18 U. S. C. § 398, provides:

> That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

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